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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| In the Matter of | ) | |
| | ) | |
| Promotion of Competitive Networks in Local Telecommunications Markets | ) | WT Docket No. 99-217 |
| | ) | |

# COMMENTS OF THE CITY OF WHITE PLAINS ON THE NOTICE OF INQUIRY ON ACCESS TO PUBLIC RIGHTS-OF-WAY AND FRANCHISE FEES

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## SUMMARY

The City of White Plains ("the City") had entered the competitive and dynamic telecommunications market even before the Telecommunications Act of 1996 (the "Act") was enacted. Since 1992, the City has been entering into franchise and license agreements with telecommunications providers, and today has three telecommunications franchises agreements and two license agreements . The City welcomes competition in the provision of telecommunications service and the benefits it brings to consumers and business. However, the proliferation of competition – and the resulting installation of facilities and equipment in the City's rights-of-way and the burden they represent– makes it imperative that the City retain its historical and statutory authority to protect its public assets.

Section 253 of the Act represents the recognition by Congress of the importance of local autonomy in this regard. Thus, Section 253(c) creates a "safe harbor" that confirms the ability of a local government to manage its public rights-of-way and obtain fair and reasonable compensation for the use thereof. Moreover, this subsection also provides that local governments can seek fair and equitable rent for the use of their property in a competitively neutral and nondiscriminatory manner.

In managing its rights-of way, the City needs to condition access to public property on a carrier's agreement to reasonable conditions intended to protect the safety and integrity of the public right-of-way that have always fallen clearly within the scope of the City's authority. It is respectfully submitted that any court decision that has indicated that the types of reasonable conditions required by the City are beyond the scope of Section 253(c) is wrong. Even if the conditions imposed by the City were outside of

Section 253(c)'s "safe harbor" – which they clearly are not – such conditions still would be permissible under Section 253(a), which only proscribe State and local governments from acting so as to prohibit (or have the effect of prohibiting) the provision of telecommunications service. It is inconceivable that Congress meant to grant telecommunications providers free license to use, and possibly jeopardize public safety, the public rights-of way.

It is further submitted that "competitively neutral and nondiscriminatory" does not mandate that all providers be treated alike. It requires only that similarly situated providers be treated in a similar manner to one another. This interpretation allows local governments to tailor their ordinances and franchise requirements to recognize the substantial differences among incumbent carriers such as Bell Atlantic and the array of competitive providers (who vary widely in technology, the degree to which they use their own facilities and the customers that they intend to serve) in each jurisdiction.

The Commission should take this opportunity to clarify that Section 253 affords local governments maximum flexibility to address their unique situations on a case-by-case basis consistent, within the overall goals of the Act to provide fair access to the public right-of way.

## INTRODUCTION

The City submits these comments in response to the Federal Communications Commission's (the "Commission") Notice of Inquiry with respect to Section 253 of the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 253.

The City first entered the competitive telecommunications marketplace before the adoption of the Act. Northeast Networks, Inc was franchised in 1992; Brooks Fiber Communications of New York, Inc. was franchised in 1997 and Metromedia Fiber Network Services, Inc was franchised in 1998. These carriers are seeking to provide local service within the City.

The City has also entered into license agreements with Qwest Communications Corporation and Northeast Optic Network, Inc in 1999. These carriers have no present plans to offer local service and requested permission to install cable along specific routes passing through the City to aid their service to other municipalities. The City is in negotiations with other providers and continues to receive inquiries on a regular basis from a number of other competitive access providers and telecommunications carriers. The City now has three telecommunications franchises and two licenses in effect, and new companies routinely are seeking access to the City's rights-of-way.

While the City clearly welcomes telecommunications competition and the benefits it brings to its residents and businesses, these benefits come with certain burdens on the public infrastructure. As more and more telecommunications carriers seek to use public rights-of-way – which, in most cases, involves installing conduit, trenching and cutting streets – the impact on the City's rights-of-way increases. The City's rights-of way already contain electrical, gas, cable televison, sewer and municipal fiber optic (for traffic control and telecommunications) lines. Thus, it is crucial that local governments retain sufficient authority to protect public property. There is not limitless space within the public rights-of way. Congress understood this, and enacted Section 253 so as to preserve the traditional authority of local governments to manage and administer their rights-of-way and charge fair and reasonable compensation for the use thereof.

The City believes that Section 253 must be interpreted by the Commission so as to preserve the ability of local governments to adequately protect the public and public assets. Specifically, the Commission should focus on at least three critical, important issues to local governments. First, local governments must have the ability to obtain fair and reasonable compensation in accord with their needs and statutory authority, including obtaining rent for the use of their property. Second, the Commission should clarify that the phrase "competitively neutral and nondiscriminatory" only mandates that similarly situated providers be treated in a like manner, not that all carriers must be treated absolutely identically. Third, Section 253 must be construed broadly to allow local governments to determine the most appropriate way to manage and protect the public rights-of-way, in light of local facts and circumstances and that the mere request of provisions intended to protect the public safety and to insure that the carrier will continue to be a responsible party over the term of any agreement is not in and of itself a barrier to entry. To that end, the Commission should confirm that Section 253 does not limit the authority of local governments with respect to public property as long as the exercise of such authority does not prohibit or have the effect of prohibiting the provision of telecommunications services. Each of these issues is explored fully below.

## I. Fair and Reasonable Compensation includes Rent for the Use of Public Rights-of-Way

Section 253(c) expressly preserves the authority of local (and State) governments "to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." The Act does not explicitly define "fair and reasonable compensation," which is not surprising since there is not one answer for all localities and there are a multitude of ways in which public rights-of-way may be used and valued. Indeed, the very idea of "fair and reasonable compensation" is, by necessity, one that is appropriate to be addressed on a jurisdiction-by-jurisdiction basis, in light of the unique circumstances and conditions in each locality, such as property values, availability of space and local statutory authority and requirements regarding the use of the right-of-way.

In fact, under the New York State Constitution, Article VIII §1 municipalities are prohibited from making gifts or loans to individuals or private corporations which has been interpreted to prevent municipalities from allowing the use of public property for less than fair and adequate consideration. In addition, the Charter of the City of White Plains (enacted by the New York State Legislature as Chapter 356 of the Laws of 1915, as amended) § 33 provides that "no franchise, lease or right to use the streets or the public places or property of the city shall be granted without fair compensation to the city therefor, and in addition to the other forms of compensation to be therein provided, the grantee shall be required to pay annually to the city such percentage of the gross receipts arising from the use of the franchise and of the plant used therewith as shall be fixed in the grant of said franchise."

It is therefore crucial for the Commission, however, to make clear that local governments are not precluded from charging rent for the use of their rights-of-way as are commonly charged other parties using the rights-of-way. The Commission should put to rest, once and for all, the oft repeated claims of some carriers that Section 253 limits compensation to the municipalities merely to the recovery of out-of-pocket costs.

Compensation for "use," of course, includes, at a minimum, reimbursement for the costs to the local government of having lines or equipment installed in the public rights-of-way. Such items may include the costs of repairing or replacing the streets or other rights-of-way that are excavated, the costs for any government personnel that are needed to ensure that the installation does not endanger public safety (both for inspection of the work and traffic control), and costs related to acquiring, maintaining and improving the public rights-of-way.

The statute, however, does not limit local governments to reimbursement for their costs. Indeed, there are a host of other "costs" which should be considered all of which are not so easily quantified, ranging from the additional costs a locality must bear to repair the streets sooner as a result of multiple street cuts that shorten the life of the street, to the costs of accidents and injuries that occur as a result of barriers in streets, or disruptions to normal public crossings and pathways and damage to the local economy including the potential loss of sales tax income from those disrupted pedestrian and motor vehicle traffic patterns in the City.

Furthermore, it should be noted that Section 253(c) does not specifically limit municipalities to "costs"; rather, it refers to "compensation". At least one court has viewed that difference as significant and ruled that: "the fact that Congress used the word 'compensation' in lieu of the word 'costs' in [Section 253(c)] is strong evidence against construing the term to limit municipalities to strictly their costs related to telecommunications providers use of their right-of-ways." TCG Detroit v. City of Dearborn, 16 F. Supp.2d 785, 789 (E.D. Mich. 1998) ("Dearborn"). The Dearborn court further elaborated:

> The term "fair and reasonable compensation", although not explicitly defined by Congress, clearly enables a municipality to charge compensation for the use of its right-of-ways as the words "fair and reasonable" are commonly understood. Any determination of whether compensation is "fair and reasonable" is not amenable to a strict test. Rather, fair and reasonable is determined by examining the totality of the facts and circumstances

Id.(emphasis added).

Although "fair and reasonable compensation" cannot be defined precisely, because it requires a case-by-case determination, it is clear that the concept is broader than simply "costs" and can clearly include the value of the use of rights-of-way.

Compensation in an eminent domain context is not usually thought of as the cost of replacing present property but rather the full fair market value of the property being obtained. In fact, the Dearborn court found that rent for the use of public property was an appropriate description of the allowed fair and reasonable compensation, thusly:

> [T]here is nothing inappropriate with the city charging compensation, or "rent", for the City owned property that [a telecommunications provider] seeks to appropriate for its private use. The statute specifically allows it. *See* 47 U.S.C. § 253(c) (this section does not affect the authority of the city to "require fair and reasonable compensation from

> telecommunications providers . . . for the use of the public rights-of-way . . . .) . Id.

The Dearborn court, in evaluating the city's compensation scheme, examined four factors in finding that the local ordinance and franchise agreement which included a franchise fee based on 4% of gross revenue was in compliance with the Act: (1) the extent or amount of the provider's proposed use of the public rights-of-way; (2) the willingness of other providers to agree to similar terms and conditions; (3) the course of dealings between the parties; and (4) whether the fees were "so excessive that it is likely to render doing business unprofitable". Id. at 790-91.

At least one federal court has taken a contrary view – that compensation equates to costs. A federal court in Maryland (which was considering a franchise fee based on 3% of gross revenue) held that "any franchise fees that local governments impose on telecommunications companies must be directly related to the companies' use of the local rights-of-way, otherwise the fees constitute an unlawful economic barrier to entry under section 253(a)." Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland, ___F.Supp.2d ___, 1999 WL 343646 *10 (D. Md. May 24,1999) ("Prince George's"). The Court further indicated that "[f]ranchise fees . . . may not serve as general revenue-raising measures." Id. The Court explained its reasoning as follows:

> The appropriate benchmark is not the "value" of [the company's] "privilege of using the County's public rights-of-way to provide telecommunications services in [the] County. Rather, the proper benchmark is the cost to the County of maintaining and improving the public rights-of-way that [the Company] actually uses. Furthermore, to be "fair and reasonable," these costs must be apportioned to [the Company] based on its degree of use, not its overall level of profitability.

Id. at *11.

This decision completely ignores the fact that the provider will be using public property and the value of the property to be used. Remuneration for use of this public property should be quite properly compensable.

Moreover, the Dearborn court is not the only court which has found that local government has authority under Section 253(c) to obtain compensation beyond mere costs. The Federal District Court for the Southern District of New York ( the local federal court for the City) recently said that an interpretation of Section 253(c) that restricts local governments to compensation for the costs of maintaining and improving public rights-of-way "may too severely limit" the concept of "fair and reasonable." Omnipoint Communications, Inc. v. The Port Authority of New York and New Jersey, 1999 WL 494120, *6 (S.D.N.Y. July 13, 1999). The Omnipoint court cited the reasoning and four part test of Dearborn in support of that position and rejected the reasoning of the Prince George's court, but failed to definitely decide the issue at this time due to the procedural posture of the case. Id. at *7.

The Commission should make clear that the analysis in Prince George's is wrong. Any interpretation of the statute which limits "fair and reasonable compensation" to the costs incurred in maintaining and improving the public rights-of-way ignores the plain meaning of the statute. Congress did not limit municipalities to their fair and reasonable costs under the statute which it clearly could have done if it meant to so limit a municipality's authority. Instead, Congress clearly used a term which is commonly used to mean the fair and reasonable value of the property to be used intending that local governments retain their historical authority to be compensated for the use of their property by charging rent.

It is respectfully submitted that municipalities should be allowed to utilize the various options for valuation which exist, such as charging on a per linear foot basis or charging the telecommunications provider a percentage of its gross revenue generated by the facilities and equipment occupying the public rights-of-way. Logically, Congress did not dictate any particular methodology in the Act. This is because the decision of how to compensate the local government is an inherently local question that will vary based on the unique situations in each jurisdiction probably at least partially based upon statutory and historical precedents in the various jurisdictions and quite possibly on the nature of the use involved. Thus, it is imperative that local governments have the flexibility to develop appropriate compensation mechanisms which comports with local authority and precedent.

A common method that enjoys widespread use is the assessment of a fee equal to a percentage of gross revenue generated within the jurisdiction. This method (which was approved by the Dearborn court) is particularly attractive because it is easy to use and it encompasses both the costs of maintaining and improving public rights-of-way and a rental fee for the use of local government property. In fact, this method of compensation for the a similar type use of public rights-of-way based on a percentage of gross revenue is recognized by its inclusion elsewhere in the Federal Communications Act. See, e.g., 47 U.S.C. § 542(b) (authorizing local governments to collect a franchise fee from cable operators of 5% of gross revenue, where the pattern of gross revenue fees had been established for decades).

Indeed, in another type of use of the public right of-way, where a telecommunication provider is just passing through a municipality in order to provide service to other municipalities, a fee based upon gross revenue may be inappropriate and another method such as a charge per linear foot may be more appropriate. Therefore, municipalities should retain the authority to set fees which fairly and reasonably compensate the municipality for use of the public right-of-way based upon the facts of each particular provider on an evenhanded basis.

Because no uniform, historical method of compensation throughout all of the states has evolved with respect to the value of the use of rights-of-way by telecommunications providers, the Act does not proscribe (or prescribe) any particular method of compensation. Since Section 253(c) is directed to preserving local authority over public rights-of-way, the most sensible interpretation of the Act is to afford local governments maximum flexibility in crafting reasonable and lawful methods of compensation. The only limitation on fair and reasonable compensation is whether a fee is so high as to prohibit or have the effect of prohibiting entry. Clearly, a 5% gross revenue fee – which has been the fee for years in the City's telecommunications franchises – would not come close to violating that test.

## II. Section 253(c) Does Not Require That A <u>Local Government Treat All Carriers Identically</u>

As noted, Section 253(c) requires local governments to act in a "competitively neutral and nondiscriminatory" manner. It does not, however, require that all telecommunications providers be treated alike – or that they all pay the same compensation for using rights-of-way. Local governments are confronted with an array of different carriers engaging in different activities, and they need the flexibility to take these differences into account.

This construction of Section 253(c) is confirmed by reference to the Act's legislative history. Representative Stupak, whose amendment rejected the use of a "parity" standard as the guidepost for local government authority, stated:

> Local governments must be able to distinguish between different telecommunications providers.... The manager's amendment states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the right-of-way or rip up our streets.

141 Cong. Rec. for August 4, 1995 at H 8460. The House ultimately rejected the "parity" standard, as reflected in the final language of Section 253(c).

Courts considering Section 253(c) also have recognized that it does not demand equal treatment among all providers. In Dearborn, the court held that the Act does not require strict equality, but rather that the compensation sought be non-discriminatory and competitively neutral." Dearborn, 13 F. Supp.2d at 792. Similarly, in Dallas I, the court held that being competitively neutral does not require cities to treat all providers identically and to ignore the significant distinctions among them including the different amounts of City rights-of-way that each company uses to provide its services. 8 F. Supp.2d at 593-594. The Commission, too, in In re Classic Telephone, Inc., Memorandum Opinion and Order, 11 FCC Rcd. 13,082, ¶ 37 (1996), has suggested that Section 253(c) allows local governments to consider whether different providers are similarly situated in deciding how to treat them and that the mandate of competitive neutrality merely requires municipalities to treat similarly situated providers in the same overall manner.

Not only is this interpretation consistent with Congress' intent, it also reflects the reality of the dynamic telecommunications market. Different providers, in the same jurisdiction, will offer different packages of services. Some providers will seek to offer universal telephone service to each household in the municipalities they enter while others will be interested in servicing merely certain business customers located perhaps within a small area of the municipality. In addition, a number of competitive providers seek access to public rights-of-way only in high-volume commercial areas, while others plan to offer residential service. Some providers will be using fiber optic cable, while other will be using other technology such as radios to offer the same service. Furthermore, some providers will be offering no services within the municipality, but are simply running their cable through the municipality in order to serve other probably larger municipalities. Some providers may be installing 500 feet of cable while others may be installing miles of cable. There simply is no basis, statutory or otherwise, to require that the City treat all of these entities the same.

The City is particularly concerned about the ability of local governments to recognize differences among different carriers because of the potential for the historical treatment of the Bell System to hamstring its ability to continue to obtain appropriate compensation from its franchises. In the City, Bell Atlantic (and its predecessors) has had access to public rights-of-way for a century without having to obtain a local franchise or pay compensation, based on a decision by the state legislature in the Nineteenth Century, that the development of a ubiquitous telecommunications system serving all residents was a valuable public benefit. Since Bell Atlantic build such a ubiquitous system and has shouldered universal service obligations to ensure that all citizens have access to basic service at affordable prices, it has had such unfettered use of the streets.

The situation today, in which multiple telecommunications providers are building their own networks designed principally to serve large business customers who now have competitive choices, is very different. These telecommunications providers, however, are asserting that since Bell Atlantic has not had to pay franchise fees, they should not have to pay either. In fact, the City is currently defending a lawsuit brought by a subsidiary of AT&T Corp. in federal court asserting this very claim. This claim has no foundation in Section 253. The historical relationship between local governments and a monopoly provider developing the first telephone systems for broad public use is no model for the appropriate treatment of telecommunications providers who are vying in a competitive marketplace to serve selected, high-end customers. Nothing in the Act suggests that local governments should be prevented from taking appropriate action – including obtaining appropriate compensation – with respect to this generation of carriers. Simply put, these telecommunications carriers are not similarly situated, and treating them differently does not violate the Act's directive for "competitively neutral and nondiscriminatory treatment."

Moreover, it may well be appropriate for the City to revisit the obligations of Bell Atlantic to require it to pay compensation for their use of rights-of-way. In its local ordinance, the City has clearly reserved its right to so revisit those obligations. In fact, historically, the City has received free use of Bell Atlantic (and its predecessors) conduit for use in its fire alarm, traffic and more recently its own governmental ( in concert with the City of White Plains Board of Education) communication system. The presence of Bell Atlantic facilities throughout the City, because of its universal service obligation, was invaluable. When and how that change occurs, however, should not affect the obligation of telecommunications providers, who are not similarly situated, to pay for their own use.

The Commission should state unequivocally that Section 253(c) requires local governments to treat similarly situated telecommunications providers in a "competitively neutral and nondiscriminatory" manner; it does not require that all providers be treated identically. When providers offer different services as compared with other providers, local governments must maintain the flexibility to create reasonable regulatory schemes that address the particular issues raised by that service offering and its impact on the local government's property.

## III. Section 253 Preserves Substantial Authority for Local Government to Regulate the Use of the Public Right-of Way

The purpose of Section 253 is to ensure that state and local governments do not become entry barriers to companies seeking to provide telecommunications services. As evidenced by the addition of five providers in the last seven years, including four within the last two years, the City's franchising policies, terms and conditions and compensation levels have not been a barrier to entry.

The City has conditioned entry on a carrier's agreement to comply with reasonable franchising terms and conditions that fall squarely within the City's right-of-way management authority. The City's franchise agreements for comparable providers are substantially similar. Typically, the City's franchise agreements run for a 15-year term with an option to renew for 15 years and define the franchise area; they require payment of a franchise fee equal to 5% of gross revenue. The agreements also contain provisions relating to, among other things, indemnification and insurance; performance bonds and a security fund; compliance with applicable local, state and federal laws and regulations; construction requirements; and termination and breach. The agreements contain restrictions on the transfer of the system or of the franchisee without the City's prior consent. In connection with the City's review of a carrier's request for a franchise, the City may request and review financial information relating to the carrier; the proposed location of the system and schedule of construction; and the carrier's past history of compliance with applicable laws and performance of its contractual obligations. The agreement may also require the guarantee of a subsidiary corporation's obligations by the parent corporation.

The City believes that each of the types of provisions or subject areas listed above is properly within its management authority preserved by Section 253(c). To the extent any court case interprets Section 253(c) differently, that case is wrong. For example, the court in Prince George's suggested that a city's request for financial information may be beyond the scope of local authority because such a request somehow "prohibits" entry into the marketplace. See Prince George's, 1999 WL 343646 at *8. That interpretation is inconsistent with the law and the facts.

Surely, the City must have the right to determine whether a carrier is financially capable of complying with such reasonable City requirements as obtaining bonds and insurance, repairing damage caused to the streets and surface structures and relocating parts of the system when necessary or appropriate. It is inconceivable that the provider would have to permit a maintenance company on the verge of bankruptcy, or a company that has repeatedly defaulted in its contracts with other providers to maintain their telecommunications system. Likewise the City is entitled to be sure that the franchisee can comply with construction, repair and removal obligations before allowing it to cut the streets of the City – which contain multiple layers of conduit, duct work, fibers, cables, and sophisticated utility equipment that are the nerve center of the City. Surely Congress did not intend to prevent the City from ensuring that a company does not pose an undue risk to the daily functioning of the City and the health, safety and welfare of the public.

The Commission should clarify that Section 253(c) gives franchising authorities sufficient flexibility to protect their rights-of-way as they deem most appropriate under the prevailing facts and circumstances. The Commission should resist the narrow reading of Section 253(c) adopted by some courts that would restrict a local franchising authority's ability to determine from a range of reasonable options the best way to protect and preserve public assets. Local conditions vary. Local governments need to be able to take those conditions into consideration when fashioning appropriate local franchising requirements. Information is required to be able to assess when it is appropriate to vary the standard provisions of the franchise agreement in order to continue to treat all similarly situated providers in an even handed manner.

Thus, the City, if it determined that it was appropriate to do so and permissible under law, could go beyond the types of provisions that it has in its franchise agreements as long as such additional provisions do not prohibit or have the effect of prohibiting market entry under Section 253(a). The City has chosen not to expand beyond the types of franchise provisions described above. Should the City choose to do so, however, the relevant test on the limits of City authority would be whether the proposed local action is or has the effect of being an entry barrier.

Unfortunately, some recent court decisions have misconstrued Section 253 by narrowly restricting local governments to the matters in subpart (c). Indeed, this reading of the Act conflicts with the plain language of Section 253(a) – the only subsection that affirmatively limits the authority of local governments. That section does not contain a broad-based ban on local government action; rather it bars regulations or requirements that "prohibit or have the effect of prohibiting" an entity from providing telecommunications services. Thus, any local requirements, including, but not limited to, those relating to managing rights-of-way, obtaining compensation and obtaining information for the public and to craft a franchise agrement, are permissible so long as they do not actually or effectively prohibit carriers from providing service.

In sum, the Commission should clarify that Section 253 is not to be narrowly construed, but rather interpreted to give local governments sufficient flexibility to protect public rights-of-way in the manner they deem most appropriate in light of local facts and circumstances. Further, the Commission should clarify that while Section 253(c) is a "safe harbor" of clearly permissible local authority, Section 253(a) establishes the legal test for defining the full scope of local authority with respect to the use of public rights-of-way.

## CONCLUSION

In an effort to strike an appropriate balance between the Act's twin aims of promoting a competitive telecommunications market and preserving traditional local government authority, and for all of the reasons set forth in the foregoing sections, the City respectfully requests that the Commission adopt the interpretations of Section 253 of the Act set forth herein.

Dated: August 13, 1999.

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